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JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

No. 326 09.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,
v.
PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY, INDIANA,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

W. H. H. MILLER,
Attorney for Defendants in Error.

The Hollenbeck Press, Indianapolis.

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OCTOBER TERM, 1903.

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STATEMENT OF FACTS.

This was an action to quiet title to real estate described.

The complaint (Partial Tr., page 1) is the statutory one provided by the Indiana code.

R. S. 1901, section 1082.

The answer is a denial of plaintiff's complaint as to certain pieces of property here in dispute.

Partial Tr., pp. 3-5.

The action was brought in the Pulaski Circuit Court and taken by change of venue to the White Circuit Court.

There was a trial by jury on this complaint and answer and verdict for defendants.

(Partial Tr., pp. 5 and 6.)

The plaintiff filed a motion for a new trial, which is set out.

(Partial Tr., pp. 7 and 8.)

This motion was overruled, judgment rendered, appeal allowed and perfected, and assignment of errors filed in the supreme court of state.

(Partial Tr., pp. 9 and 10.)

The law as to hearing of appeals having been changed, the case was transferred to and decided and opinion filed by the appellate court.

(Partial Tr., pp. 10-15.)

Thereupon plaintiff in error filed its petition for a rehearing, every proposition of which is set out.

(Partial Tr., pp. 15-17.)

In this petition there was as to some propositions a little in the way of argument which we have omitted, though nothing therein suggests a federal question.

This petition having been overruled, plaintiff in error sought to have the action of the appellate court reviewed

by the supreme court of the state under subdivision 2 of section 1337j, R. S. 1901, the grounds of its petition being set out. This petition was denied.

(Partial Tr., p. 17.)

Thereupon this writ of error was sued out.

ARGUMENT.

It will be seen by an examination of the partial transcript above referred to that, from the commencement of the case until after the petition for a rehearing had been overruled in the appellate court, there is not a word in any paper directly or indirectly suggesting a federal question. For the first time in the record of the case, in the application to the supreme court to review the action of the appellate court, such a question is suggested. In Point 1 in said petition (Partial Tr., p. 17) we find the following:

"The appellate court held that it was shown without dispute that the property in controversy was not used for railway purposes; that it was after acquired, and on this account was not within the description in the mortgages upon which appellant's title is based. This was error. *The court thereby refused to give due effect to the judgment of the federal court.*"

This is simply a suggestion and is the only suggestion or utterance in any of the papers directly or indirectly making such a point.

Further along it will be shown that the making of such a point in this application for a transfer to the supreme court, after a final decision by the appellate court, was too late and wholly ineffective.

Not only does it thus appear that no federal question was made in the record, but no suggestion of any federal

question was made in the briefs of counsel for plaintiff in error on the original hearing in the appellate court, or on the petition for a rehearing in the same court.

In the brief on the original hearing counsel for the appellant there, plaintiff in error here, filed a printed brief of twenty-two pages, and from beginning to end in no way raised, attempted to raise or suggested that any question involving a right, claim or privilege under the constitution, statutes, treaties or authority of the United States, directly or indirectly, was involved in the case. They argued the questions and only the questions covered by the opinion of Judge Henley in deciding the case.

And so in the petition for a rehearing no such question was suggested. Prior to the filing of that petition the rules of the supreme and appellate courts had been changed so as to require that propositions of law upon which a party relied in the argument of a case should be distinctly and separately stated before the commencement of the argumentative part of the brief. Accordingly, in the brief filed on behalf of appellant (plaintiff in error), on the petition for a rehearing, counsel stated sixteen distinct propositions of law, the same being numbered from one to sixteen, inclusive, and cited authorities in support of the same. In not one of them is there a sentence or a word claiming that any federal question was involved or asking the decision of any such question. Nor was there in the argument in support of those propositions any such contention. The whole scope and contention of the argument was that the description in the mortgages under which plaintiff in error claimed title, including the after-acquired property clause, was sufficient to carry the title to plaintiff. There was no contention that the decree of the federal court was broader than, or was in language different from, the descriptions in the mortgages. Nor

was there any contention that, by failing to so hold, the court was denying to plaintiff any right, privilege or immunity to which it was entitled under the constitution, treaties, laws or authority of the United States. In short, there was not in the entire brief a suggestion of a federal question.

We have not deemed it necessary to set out these briefs in full, because we are sure that counsel for plaintiff in error will not claim that any such question is made therein, and certainly, if they do so claim, they will quote the passages upon which they rely as containing any such assertion of a federal right infringed or violated.

In order, however, that there may be no question about this, we do print the propositions of law, as stated by counsel for appellant in said original brief, as follows:

1. Page 2. "Both parties, therefore, claim title through the Louisville, New Albany and Chicago Railway Company, and the abstract question was presented to the court as one of law, as to whether the foreclosed mortgages carried the title to these depot premises in dispute, the appellant affirming that they were embraced within the mortgages and foreclosure, and the appellees contending that they were not, because the deed to appellant, of date February, 1896, was *after* the execution of the mortgages on which the foreclosure was had, and the same was *not covered* by the *after-acquired clauses* in such mortgages, and was not, therefore, embraced within the foreclosure and sale under the proceedings in the United States court.

"It, therefore, became an abstract legal question for the lower court to determine whether they passed by the foreclosure, and, concluding that they did not, the court instructed the jury to return a verdict for the defendant. This was manifest error in the trial court."

2. The second point presented was in the following words:

"It was sought by appellees' counsel on the trial to show, over the objections and exceptions of the appellant, that the land in question was used for *other than railroad purposes*. The error of court in this respect was assigned as a ground for a new trial."

3. The third point argued was that the trial court erred in excluding evidence offered by the appellant, plaintiff below, to prove facts tending to show that the property in question had been occupied so far as it was susceptible to occupation for railroad purposes; that the railroad company had paid taxes and special assessments for street improvements and had executed leases for elevators, store houses, lumber yards, etc.

4. And the fourth point argued was that a mortgage in general terms providing that the lien shall attach to after-acquired property is effective to create such a lien.

We set out also the propositions of law, sixteen in number, in the brief for appellant on petition for rehearing, as follows,—the authorities cited being omitted.

Propositions of Law.

I.

Since May 6, 1853, railway companies in Indiana have been authorized to hold real estate other than that which they used or needed for railway purposes.

II.

By the act of March 3, 1865, railway companies were authorized to issue bonds, and to secure the payment thereof, mortgage "its railroad, or any part thereof, and

its real and personal property * * * whether then held or thereafter acquired."

This act is still in force.

R. S. 1901, section 5212.

III.

The power to mortgage after-acquired property, without reference to the purpose for which it has been acquired, necessarily includes the power to describe it in the mortgage by general description. It is impossible to describe after-acquired property in any other way.

IV.

It must be conceded that "a deed or mortgage of all the real estate of the grantor or mortgagor is good without any further description, because the real estate conveyed or mortgaged can be ascertained by evidence *aliunde*."

V.

It has been repeatedly held, and it is the law, that railway mortgages may describe the property of the mortgagor as being its "road and other property," and that such general description showing an intent not only to mortgage all railway, but all property, will extend the mortgage to all property of the company whether used for railway purposes or not.

VI.

In this case, as it clearly appears that the mortgages upon which appellant bases its claim of title cover all of the railway and other property of the mortgagor, whether then held or afterward acquired, and as the statute expressly authorizes after-acquired property to be mortgaged, it must follow that an exercise of this power to mortgage after-acquired property by the same description as is sufficient to include property owned when the mortgage is given, is sufficient.

VII.

The provisions of statutes with reference to mortgages on purely local and private property do not apply to mortgages on railway property.

VIII.

In such cases if the description of the property in the mortgage is valid, and the decree by proper words refers to this description, even though the description in the decree is insufficient, standing alone, the decree is valid.

IX.

The second paragraph of the complaint shows adverse possession from the year 1862 continuously until the date that this action was brought. This possession has been maintained by the appellant and its grantors, immediate and remote. The reference in this paragraph to a plat made by one Allison is mere surplusage, or, at the most,

is for the purpose of showing color of title, and is unnecessary. The court erred in requiring appellant to make this paragraph more specific by stating the interest which the one who made the plat had in the property at the time it was made.

Color of title is unnecessary in cases of adverse possession, where all property claimed has been actually occupied.

X.

There was evidence from which the jury might have inferred that appellant and its grantors had been in adverse possession of this property for more than thirty years. The court erred in directing the jury to find for the defendants, as the mortgage would have attached by virtue of the "then owned" property clause, if the jury had found such possession to exist.

XI.

The offered evidence by which it was intended to show adverse possession since 1862 was excluded because plaintiff had alleged a title in fee simple and could not prove a title by adverse possession.

The title by adverse possession is as much a title in fee as one by direct conveyance from the owner, and it was error to exclude the evidence.

XII.

The plat which was offered in evidence was improperly excluded. The indication of the donee by the use of the words "depot grounds," the location of buildings and a

then existing railway, with evidence of continued use without interruption from the grantor, would have been a sufficient designation of the grant intended.

XIII.

It was unnecessary to show that this plat was in fact signed by the then owner of the land. All such plats have been legalized and given effect as of the date of the record thereof, to the same extent as if they had been signed by the owner before recording.

R. S. 1901, section 4238a.

XIV.

It is admitted by all parties that James C. Brooks and wife, who made a deed in 1896, were the sole heirs of James Brooks, who owned this property when the plat was made. This deed recognizes the existence of the plat, and it is to be construed with it as of the date of the plat in order to make certain the descriptions and donations intended by it.

R. S. 1901, section 4415.

XV.

Even if these statutes did not exist, and there was no proof that the one who made the plat was the owner of the property at that time, yet with evidence of the fact that the donee had occupied the tract designated on the plat, without objection from the true owner, it was sufficient to warrant the jury in finding a dedication and acceptance.

XVI.

As the mortgages upon which appellant's title is based covered *all property*, whether then owned or thereafter acquired, without reference to the use to which it was being put or was adapted, the fact that the property was not used or adapted for railway purposes could not affect the rights of the mortgagee or appellant, and the court erred in admitting evidence to the effect that this property was not used for railway purposes.

By rule 22 of the supreme and appellate courts of Indiana it is expressly provided that " no alleged error or point not contained in this statement or points shall be raised afterward either by reply brief or in oral or printed argument or on petition for rehearing."

II.

That the mere mention of this question, in the petition for the transfer of the case to the supreme court, is insufficient to invoke the jurisdiction of this court, for the decision of the federal question so suggested is entirely clear.

While it is not so expressly denominated in the statute (paragraph 2 of 1337j, R. S. 1901), yet in practical effect that statute is a provision authorizing the supreme court by writ of *certiorari* to review the decision of the appellate court in a special case, where it shall be of opinion that the decision of the appellate court contravenes a ruling precedent of the supreme court or that a new question of law is directly involved and was decided erroneously.

In the case at bar the supreme court found nothing of the kind, refused to take jurisdiction to rehear the case and denied the application. So that the judgment of the appellate court stands, and this fact has been recognized by the plaintiff in error in that they have sued out their writ of error from this court directed to the appellate court.

It, therefore, is too clear for argument that, as no federal question was presented in the appellate court or in the trial court, it can not be presented here.

III.

But had the same language been used in the brief or record in the appellate court that was used in the application for the transfer to the supreme court it would have been insufficient.

This case is one of the class where the federal title, privilege or immunity must be specially set up and claimed. And it is not sufficient in a case of this kind barely to suggest the violation of a federal right.

Oxley Stove Co. v. *Butler County*, 166 U. S. 648;

Columbia Water Power Co. v. *Columbia Electric, etc.*, 172 U. S. 475;

Home for Incurables v. *City of New York*, 187 U. S. 155;

Layton v. *Missouri*, 187 U. S. 356;

Jacobi v. *Alabama*, 187 U. S. 133.

In the Layton case, *supra*, it is expressly held that where the highest court of the state declines to pass upon a federal question because the same was not submitted

to the trial court, this court will not consider such question.

Even if the federal question had been suggested and argued in the appellate court, that court would not have been bound to decide the same, and would not have decided the same, unless it were within the necessary purview of the pleadings, and had been distinctly brought to the attention of the trial court in the motion for a new trial or otherwise, and it must affirmatively appear that the question was presented to the trial court. Elliott Appellate Procedure, section 470, and cases cited; *Coleman v. Dobbins*, 8 Ind. 156. And nothing is better settled in Indiana practice than that neither the appellate court nor the supreme court will decide any question upon petition for a rehearing which was not raised and clearly presented upon the original hearing.

See Elliott's Appellate Procedure, section 557, and the multitude of cases there cited.

Much more, then, in a case where, as in the case at bar, there was not in the trial court nor in the appellate court, which affirmed the judgment of the trial court, a suggestion of any such question, either in any paper which constitutes a part of the record, or even in the briefs of counsel, and where the opinion of the appellate court shows that no such question was considered or decided, it seems idle to contend that the bare suggestion of such a question for the first time in an application to have the supreme court review the action of the appellate court as upon *certiorari* should be sufficient to bring the question here.

In conclusion it is submitted, without imputation of an improper purpose on the part of counsel for plaintiff in error, that the only possible effect of suing out this

writ of error is delay. The writ ought, therefore, to be dismissed, or, if not, the judgment should be at once affirmed.

W. H. H. MILLER,
Attorney for Defendant in Error.

Indianapolis, September 7, 1903.